

#1070

VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE OF DAVID K. WEST
GRIEVANCE NO. 15-03-(950504)-0042-04-01

STATE OF OHIO	:	
	:	
The Employer	:	
	:	
-and-	:	<u>OPINION AND AWARD</u>
	:	
FRATERNAL ORDER OF POLICE/	:	
OHIO LABOR COUNCIL, INC.	:	
UNIT 1	:	
	:	
The Union	:	

APPEARANCES

For the Employer:

Robert J. Young, Sergeant and Advocate
Barry Donley, Witness/Lieutenant
Rachel Livengood, Manager, Dispute Resolution Section
Office of Collective Bargaining

For the Union:

Paul J. Cox, Chief Counsel
David K. West, Grievant
Renee Engelbach, Paralegal
Edward F. Baker, Sr., Staff Representative

MARVIN J. FELDMAN
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I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this case was scheduled and conducted at the Zanesville Post of the employer located near Cambridge, Ohio, on July 27, 1995, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn and sequestered and that post hearing brief would not be filed. It was upon the evidence and argument that this matter rose to arbitration for opinion and award.

II. STATEMENT OF FACTS

The grievant is a sixteen year employee of the State Highway Patrol and is employed as a trooper. At the time the incident occurred there was in effect the following policy provision under which the grievant was expected to conduct himself. There was no argument made by the union that the following provision was non-published to the grievant; that the provision was unreasonable or that the provision was unevenhandedly applied.

"III - SPECIAL PROVISIONS

All employees shall maintain their current address on file with the Division. All sworn officers shall have their residence location approved by a commissioned officer before the employee occupies such living quarters. All sworn officers and other employees subject to emergency recall shall immediately establish telephone service upon occupying living quarters. The telephone service shall be maintained to permit ready contact concerning regular and emergency duties."

As a result of some inability to reach the grievant by phone for special duty or extra duty work an investigation was conducted and the reported investigation under date of March 12, 1995, revealed the following:

"On February 17, 1995 the Zanesville Post Secretary Tina Davy attempted to telephone Trooper D. K. West. At his residence to offer him an opportunity to work an off duty escort detail. When Secretary Davy made the call she discovered the employees telephone number (614)432-7848 had been disconnected.

On February 20, 1995 the Post attempted to recontact the employee at the residence and again discovered the telephone was still disconnected.

On February 21, 1995 the Post Commander contacted the GTE Telephone Company in an attempt to determine the cause of the telephone problem and discovered the phone service had been disconnected on February 15, 1995 because the employee has not paid his telephone bill.

On February 22, 1995 5:50am Trooper West was read the Internal Investigation Pre-Interview (HP24A) form in the presence of Trooper W. E. Ellis the Post Associate Labor Representative. Trooper West stated he was aware the telephone service had been disconnected, but was unable to pay his bills because he had been suspended and had to wait for his next check. No written statement was taken.

This employee made no effort to make himself accessible for emergency calls or other business related matters until after being confronted with the issue.

This is the third occurrence of a similar incident."

It might be noted that the grievant was allowed to take the cruiser home with him and to be able to answer phone calls and report forthwith in that cruiser when needed and called. At any rate, the grievant's failure to provide a phone number would not allow that to occur. Hence

the investigation followed and the results have been stated hereinabove. On April 3, 1995, it was recommended by the Zanesville Post commander that the grievant receive appropriate discipline. In an interoffice communication of April 3, 1995, the following notation was noted:

"On February 21, 1995, an administrative investigation was initiated involving Trooper D. K. West for failing to maintain telephone service at his residence as required by Divisional Rules and Regulations. The employee is experiencing financial difficulties and was aware the telephone service was disconnected on February 15, 1995. Trooper West made no effort to make the patrol post aware of the disconnection of his telephone service and made no effort to make himself accessible for emergency calls or other business related matters until after being confronted with the issue. This is the third occurrence of a similar incident."

The matter followed its normal procedure of discipline and on April 12, 1995, the following notation was made by the District Seven Commander of the State Highway Patrol:

"It is herewith stated that reasonable and substantial cause exists to establish that Trooper David K. West, U755, P60, D7, has committed an act or acts in violation of the Rules and Regulations of the Ohio State Highway Patrol, specifically of:

Section 4501: 2-6-02 (X) (2) - LIVING
QUARTERS

It is charged that on February 15, 1995 Trooper West's telephone service was disconnected for non-payment. He was aware of the disconnection and made no effort to make himself accessible for emergency calls or other business related matters, until confronted with the issue."

On date of April 21, 1995, a notice was forwarded to the grievant

stating that he was the subject of a suspension of five days. Correspondence of April 21, 1995, in pertinent part, revealed the following:

"Notice is hereby given that the Director of Public Safety, Charles D. Shipley, intends to suspend you from your employment with the Ohio State Highway Patrol for a period of five (5) working days for violation of the Rules and Regulations of the Ohio State Highway Patrol specifically Section 4501: 2-6-02 (X) (2). It is charged that on February 15, 1995 your telephone service was disconnected for non-payment. You were aware of the disconnection and made no effort to make yourself accessible for emergency calls or other business related matters, until confronted with the issue."

A prediscipline meeting was conducted on April 26. On April 27, the reviewing officer at that meeting stated by correspondence, in pertinent part, the following:

"After listening to the evidence, reviewing the provided documentation, and considering information brought out during the questioning, I find just cause exists for discipline."

To that, a protest was filed and that protest revealed the following statement of grievance:

"I WAS SUSPENDED WITHOUT JUST CAUSE, AND PROGRESSIVE DISCIPLINE WAS NOT FOLLOWED."

The remedy requested revealed the following:

"THAT I BE MADE WHOLE, AND THIS PUNISHMENT BE ERADICATED FROM MY RECORD."

A step two grievance meeting was held and the hearing officer made the following analysis in a written document of May 22, 1995:

"MANAGEMENT CONTENTION and FINDING

Management contends that just cause for discipline was established and no violation of the agreement occurred. The level of discipline was determined appropriate by the Director of Public Safety.

The facts are indisputable, grievant is aware of the applicable rule, yet has failed to comply. His failure to notify his supervisors in a timely manner to make other arrangements is further evidence of his blatant disregard of the rule.

The employer can show a legitimate business need for the rule and a willingness to reasonably accommodate employees when unusual circumstances arise. The grievant's department record reflects grievant's disdain for this and other employer rules.

It is the position of the employer that the grievant's repeated failure to comply constitutes a serious violation of Division work rules. The level of discipline was not unreasonable, arbitrary or capricious. The grievance is denied."

In the final step three response prior to arbitration, it was revealed that the following was stated by the chief of the contract administration directed to the grievant under date of July 5, 1995:

"This Office has reviewed your grievance alleging a violation of Article 19 of the Unit 1 Agreement and Section 4501-2-6-02(X)(2) of the Ohio State Patrol Code of Ethics/Regulations. You grieve that on you were improperly issued a five-day suspension without just cause. In addition, you allege that Management failed to follow the principle of progressive discipline. As a remedy, you request to be made whole and to have your department record expunged.

Your supervisor attempted to contact you via the telephone on February 22, 1995, only to find

that your telephone was disconnected. Management later discovered that your telephone was disconnected due to non-payment effective February 15, 1995. You failed to make other arrangements with your supervisor as directed in the Highway Patrol policy, Section 4501-2-6-02(X)(2). Your department record reveals that your telephone was also disconnected for non-payment on March 20, 1993 and August 17, 1994.

This Office has determined that management acted within guidelines of Article 19 in imposing a suspension upon you for the above-mentioned offenses. The suspension was commensurate with the offense and did not constitute a violation of the Agreement. Therefore, this grievance is denied."

Another fact important to this particular matter is the personnel department record of the grievant. It was placed into the record of this case. It might be noted that on March 29, 1993, the grievant received a verbal reprimand for his phone being disconnected for non-payment and on August 17, 1994, he received a written reprimand for the same activity. In neither event was a grievance filed. In each event the grievant did not notify his employer and provide an alternate member. Thus, the instant incident is the third event of the same type.

It might be noted further that the grievant indicated and stated that he had recently gone through divorce proceedings; that he had gone through bankruptcy proceedings; that he had received a suspension for other reasons and lacked funds to support a telephone at home and thus his personal problems had mounted so as to disallow him from obtaining telephone service as needed under the policy under which he was employed. It might be noted that two sections of the contract are important to the matter at hand, namely 18.08 which stated:

"18.08 Off-Duty Status

Disciplinary action will not be taken against any employee for acts committed while off duty except for just cause."

It might also be noted that the section 19.01 is important to the matter at hand also and it revealed the following:

"ARTICLE 19 - DISCIPLINARY PROCEDURE

19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause."

The parties entered into a stipulation concerning the issue and the issue that the parties stipulated to revealed the following:

"Was the grievant, David K. West, issued a five day suspension for just cause? If not, what shall the remedy be?"

It was upon all of that data and activity that the this matter rose to arbitration for opinion and award.

III. OPINION AND DISCUSSION

The activity in this particular matter by the employer is based upon the fact that the policy under which the grievant was employed demanded access to the grievant during off duty hours so as to inform the grievant of an emergency or a need for overtime or special work. Troopers are allowed to take their work vehicles home and that is based upon the fact that the troopers are expected to respond when called in

for emergency or special duty. The grievant knew the rule. The grievant had been disciplined under the rule prior and the rule was not new or novel to the grievant nor was the fact that discipline could arise as a result of this violation. The grievant did not complain of lack of publication, unevenhanded treatment or unreasonableness of the rules.

This is not a situation of activity that occurred off duty. It has to do with the employment activities of the grievant. It is employment related and as such falls under the just cause provision of contract section 19.01 rather than section 18.08 of the contract. It really makes no difference because both causes demand just cause but it is important for a member of the Ohio State Highway Patrol, which is a paramilitary organization, to remain available for immediate duty. That is one of the conditions of his employment and the grievant has known that for many years. The policy is not new or novel or unique. It is a necessity and the employer has every right to believe that it will be followed.

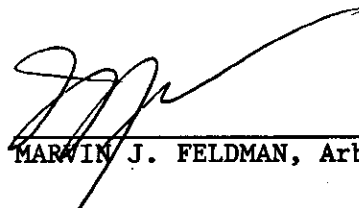
On the basis of the evidence in this particular case there is no choice but to discipline the grievant. The only question that remains is the severity of the discipline meted out by the employer. In this particular case the grievant received a five day suspension. For the prior two instances the grievant was given a verbal reprimand and a written reprimand. It is apparent that a two day suspension would have been sufficient especially in light of the fact that the grievant had been experiencing financial difficulties at this particular time and this would do nothing but further complicate the financial abilities of

the grievant. There is no evidence to show that the grievant had not undergone a divorce or a bankruptcy. As a matter of fact, the employer knew that and knew that the grievant was hard pressed for funds. A two day suspension makes the point and allows the grievant some financial latitude so he can get himself back into some stable financial condition.

For reasons shown, the discipline was for just cause but somewhat severe. Arbitrators do not create their own industrial justice but from the evidence it is apparent that the employer overlooked the grievant's financial condition when the discipline was rendered. Based upon the fact that the grievant needed some relief especially at this particular time, the five day suspension must be modified.

IV. AWARD

The grievant's suspension shall be for a period of two days. The grievant shall be repaid three days of wage forthwith, all for reasons stated.


MARVIN J. FELDMAN, Arbitrator

Made and entered
this 10th day
of August, 1995.